

Global Network Initiative Submission to the European Commission Consultation Improving Cross-Border Access to Electronic Evidence in Criminal Matters

1. Introduction

The Global Network Initiative (GNI) welcomes the opportunity to participate in this public consultation on “improving cross-border access to electronic evidence in criminal matters” and submits these brief comments in order to contribute to the Commission’s considerations, as well as the broader, global public debate around this issue. We understand the scope of this consultation to include consideration of potential arrangements to facilitate requests for electronic evidence by law enforcement authorities within the European Union to service providers whose main seat is outside of the EU, and correspondingly by law enforcement authorities outside the EU to service providers within. Our recommendations below focus primarily on that context. With respect to any such measures being considered within the EU, the GNI urges the Commission to ensure that they take into account, are compatible with, and avoid duplicating existing EU regulations and directives.

The GNI is a multistakeholder initiative composed of companies in the information and communication technology sector, human rights and press freedom organizations, academics, and socially responsible investors. GNI members work collaboratively through internal and external engagement to promote and protect freedom of expression and privacy in the ICT sector.

2. Relevant Legal Context

It is the duty of governments to safeguard their citizens and this may involve the use of information to investigate, arrest, prosecute, and convict. The powers granted to governments to conduct such activities create the potential for significant interference with individual privacy and liberty. All instances of government access to information for these purposes must therefore adhere to the rule of law, respect and protect human rights, and be grounded in the principles of legality, necessity and proportionality. As various UN resolutions and statements of UN rapporteurs have underscored, the same internationally-recognized human rights principles that apply offline, must also be protected online.¹

If and when such requests are made by governments to companies, it is important to consider and understand the respective human rights duties of states and responsibilities of companies, as well as corresponding considerations of remedy, as set out in the UN Guiding Principles on

¹ See, e.g., A/RES/68/167; A/HRC/RES/32/13; A/RES/69/166; A/HRC/RES/26/13; A/HRC/RES/28/16.; A/RES/71/199; A/HRC/RES/34/7.

Business and Human Rights.² In addition, where governments make such requests for data stored outside of their own borders, states should take steps to respect important principles of comity and sovereignty, as well as the specific sovereign interests of other nations.

3. GNI's views and recommendations

The digitization of our societies is exponentially increasing the speed and scale of the data generated and stored. This data relates to a wide swath of economic, social, political, educational and health-related activities. This includes some of the most sensitive types of data – private thoughts, communications, and ideas, as well as personal information, plans, and activities.

In this contemporary digital context, any laws or policies enabling governments to lawfully request and access electronic evidence must be carefully designed to respect and protect internationally recognized human rights. They should be developed with multi-stakeholder input, include measures and commitments on transparency, require independent authorization and oversight of such requests, and ensure accountability.

The GNI Principles on Freedom of Expression and Privacy, which were developed through a multistakeholder process and are grounded on internationally recognized human rights, create a set of expectations and recommendations for how companies should respond to government requests that could affect the free expression and privacy rights of their users, consistent with the UN Guiding Principles. As such, the GNI Principles are highly relevant to any consideration and discussion of how best to structure and regulate government access to user information in the criminal context. We hereby include and submit the GNI Principles for consideration as part of this submission.³

In 2014, GNI commissioned a report to enhance understanding of how existing means for law enforcement access to cross-border electronic evidence were faring in the face of contemporary digital developments. That report, which was published in January 2015 and is also included by reference as part of this submission,⁴ set out recommendations on how to strengthen and improve the Mutual Legal Assistance (MLA) regime by investing in electronic data request systems, streamlining procedures, and enhancing training to expedite requests. These measures remain critically important to a modern MLA system and should be pursued at

² *UN Guiding Principles on Business and Human Rights*, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

³ *GNI Principles on Freedom of Expression and Privacy*, available at: https://globalnetworkinitiative.org/sites/default/files/GNI-Principles-on-Freedom-of-Expression-and-Privacy_0.pdf

⁴ Andrew K. Wood, "Data Beyond Borders: Mutual Legal Assistance in the Internet Age," January 2015, available at: <https://globalnetworkinitiative.org/sites/default/files/GNI%20MLAT%20Report.pdf>

the EU level as part of any set of proposed reforms. The report also explored new approaches, including the possibility of a new multilateral treaty on government access to data. Beyond improving the existing MLA regime, GNI acknowledges that new approaches may be needed, including processes by which governments request data directly from companies across borders. However, any new approaches at the EU-level or within EU member states must respect and protect internationally-recognized human rights as set out in the International Covenant on Civil and Political Rights, including the principles of **legality, necessity and proportionality**.

In addition, GNI members consider the following, non-exhaustive list of measures and commitments critical to the design and implementation of legal procedures for facilitating cross-border requests for electronic evidence by law enforcement authorities for criminal matters in a manner consistent with international human rights law: **independent prior authorization** of requests; **focus on serious crimes**; availability of **meaningful redress**; **transparency** regarding the number, type, and scope of the requests; and **oversight and accountability** to regularly ensure that requests meet such requirements.

Finally, the EU must ensure that countries outside of the EU would only get the benefit of such a process when their laws and practices meet international standards on human rights and privacy. These standards include providing basic fair trial rights, prohibiting torture, and ensuring that surveillance laws afford adequate privacy protections to individuals whose data they are seeking. Whether a country's laws and practices meet those standards must be determined through an objective, transparent, and credible process.

4. Conclusion

We very much look forward to continuing to engage constructively with the Commission, EU member states, other governments, multilateral organizations, and other critical stakeholders on this issue. We hope that further consideration of this topic will be conducted carefully, deliberately, and transparently.
